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CRIMINAL LAW ISSUE

SAYLOR v. STATE, No. 48S00-9712-PD-647, ___ N.E.2d ___ (Ind. Mar. 20, 2002).
RUCKER, J.

Over the jury's contrary recommendation, the trial court sentenced Saylor to death, and we affirmed the convictions and sentence on direct appeal. Saylor v. State, 686 N.E.2d 80 (Ind. 1997). [S]aylor filed a petition for post-conviction relief, which the post-conviction court denied after a hearing. He now appeals that denial. . . . . . .

. . . .

Saylor claims he was denied meaningful appellate review on direct appeal because this Court failed to review adequately the trial judge's override of the jury's recommendation against death. We ruled against Saylor on the jury override issue in his direct appeal. See Saylor, 686 N.E.2d at 87-88. We now revisit this issue in light of the recent United States Supreme Court decision in Apprendi v. New Jersey, 530 U.S. 466 (2000).

Apprendi, a non-capital case, involved a New Jersey "hate crime" statute that authorized a trial court to increase the sentencing range for a crime when the court found, by a preponderance of the evidence, that the defendant's purpose in committing the crime was to intimidate an individual or a group because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. [Citation omitted.] Finding this statute unconstitutional under the Fourteenth Amendment's Due Process Clause, the United States Supreme Court announced the general rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." [Citation omitted.]

. . . Saylor contends that in light of Apprendi, Indiana's death penalty statute is unconstitutional because it deprives him of the right to have a jury—rather than a court—determine the existence of an aggravating circumstance beyond a reasonable doubt.

In Walton v. Arizona, 497 U.S. 639 (1990), the United States Supreme Court addressed a sentencing scheme similar to Indiana's. . . . In Apprendi, the United States Supreme Court was careful not to overrule Walton. . . .

Criticizing the majority opinion, four justices in dissent insisted that Apprendi effectively overruled Walton, [citation omitted]; and one justice, in a separate concurring opinion, declared that Walton could be re-examined "another day," [citation omitted]. In any event, although Apprendi may raise doubt about the continued validity of Walton, until it is expressly overruled, Walton is still good law. [Footnote omitted.] [Citation omitted.] . . .

Apprendi does not require that a jury prove [sic] beyond a reasonable doubt every fact related to sentencing. Rather, Apprendi requires that only those facts that increase

the penalty for a crime beyond the prescribed maximum be proved beyond a reasonable doubt. . . .

. . . It is true that a person may be sentenced to death only upon proof beyond a reasonable doubt of the existence of certain statutory aggravating circumstances and upon a finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances. [Citations omitted.] . . . The fact that death is a possible sentence where a murder is accompanied by one or more statutory aggravators places death as the prescribed statutory maximum. [Citations omitted.] On this additional ground we conclude that Saylor has failed to show that Indiana's death penalty statute is unconstitutional within the dictates of Apprendi. [Footnote omitted.]

. . . .

SHEPARD, C. J., and DICKSON, J., concurred.

BOEHM, J., filed a separate written opinion in which he concurred, in part, and in which he concurred in the result, in part, as follows:

Justice Sullivan's reasoning as to the logic of Apprendi seems persuasive to me. At the least, Justice Sullivan's dissent, echoing Justice O'Connor's dissent in Apprendi v. New Jersey, 530 U.S. 466, 523 (2000), raises very substantial issues as to the application of that decision by the Supreme Court of the United States to Indiana's death penalty statute.

The effect of Apprendi on death penalty statutes similar to Indiana's is currently under consideration in the Supreme Court of the United States in Ring v. Arizona, 25 P.3d 1139 (Ariz. 2001), cert. granted, 122 S. Ct. 865 (Jan. 11, 2002). In Ring, on the authority of Walton v. Arizona, 497 U.S. 639 (1990), the Supreme Court of Arizona upheld on direct appeal that state's death penalty despite the subsequent holding in Apprendi. Walton is, of course, the principal support for the majority's views on this issue. Despite the grant of certiorari in Ring, I find the majority's prediction as to the likely result in that case to be plausible. One thing is certain: until Ring is decided, this issue of federal constitutional law is unresolved. However, as explained below, whatever the resolution of this issue as a general proposition, I believe Saylor's sentence does not violate the Constitution of the United States.

This case raises a second debatable issue. Before Apprendi was decided, Saylor's trial and sentencing, his direct appeal, and his petition for certiorari were all concluded. Even if it is determined that Apprendi invalidates the future authority of Indiana trial judges to sentence defendants to death against the jury's recommendation, it is not at all clear that Apprendi applies retroactively to Saylor's case.

It is not clear to me, as both the majority and Justice Sullivan appear to assume, that Apprendi would retroactively apply to Saylor's case. . . .

. . . .

All of the foregoing seems to me to be trumped by the fact that Saylor was on probation at the time of the crime. That circumstance seems to me to put Saylor's case within the doctrine announced in Apprendi that the fact of a prior conviction is not among the facts that need to be found by the jury. Apprendi, 530 U.S. 466, 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Status as a parolee or probationer seems to me to be qualitatively the same as a prior conviction for these purposes. . . .

. . . .

SULLIVAN, J., filed a separate written in which he concurred, in part, and in which he dissented, in part, as follows:

I believe that in most cases, our death penalty statute does not violate Apprendi. But contrary to the majority's view, I believe that in certain cases in which the jury recommends

either a term of years or makes no sentencing recommendation and the judge nevertheless sentences the defendant to death, the requirements of Apprendi are not met and the sentence is therefore unconstitutional. Saylor's is such a case.

. . . .

[T]he imposition of a death sentence under the Indiana capital murder and sentencing regime requires the following three steps:

> Step (1): A finding that the State has proved beyond a reasonable doubt the elements of the crime of murder set forth in Ind. Code §35-42-1-1.
>
> Step (2): A finding that the State has proved beyond a reasonable doubt one or more of the death eligibility factors set forth in Ind. Code §35-50-2-9 (b). These first two steps comprise the Supreme Court's "eligibility stage."
>
> Step (3): A finding that any mitigating circumstances that exist are outweighed by the aggravating circumstances or circumstances. Ind. Code §35-50-2-9 (k) (2) (1998). This third step comprises the Supreme Court's selection stage."

There is no dispute but that the finding in step (1) must be made by a jury. And whatever it may say about step (2) (to be discussed at length infra), Walton v. Arizona, 497 U.S. 639 (1990), holds that a jury is not required to make the finding in step (3).

Where the majority and I differ is whether Apprendi requires that the finding of step (2) be made by a jury. I believe Apprendi so requires.

. . . .

[I]t seems to me that, regardless of how Arizona's capital sentencing scheme operates, the finding required in step (2) of the Indiana scheme is precisely the kind of finding in a capital case that Apprendi contemplates being made by a jury: a "determin[ation of] the existence of a factor which makes a crime a capital offense"; a determination of "all the elements of an offense which carries as its maximum penalty the sentence of death"; a determination of the "actions that expose [a defendant] to the death penalty … ." Id. at 497. . . .

. . . .

However, I believe that in most circumstances the Indiana statute complies with the Apprendi mandate. For this reason, I disagree with the conclusion of Judge Hawkins in State v. Barker, No. 49G05-9308-CF-095544 (Marion Sup. Ct. Sept. 10, 2001), interlocutory appeal granted, No. 49S00-0110-DP-461 (Ind. Oct. 10, 2001), that Apprendi renders Ind. Code § 35-50-2-9 (b) unconstitutional on its face.

. . . [I] believe that our statute complies with Apprendi in all but two limited situations – and that even in some of those two limited situations, Apprendi is satisfied.

. . . .

[W]here a jury recommends a term of years or makes no sentencing recommendation — I believe that Apprendi prohibits imposition of death or life without parole. This is because in these two situations the jury need not have found that the State has proved beyond a reasonable doubt the existence of one of the eligibility factors set forth in Ind. Code §35-50-2-9 (b), i.e., step (2).

. . . .

The difficulty that these cases present, of course, is that it is not always apparent, when the jury recommends a term of years or makes no sentencing recommendation, whether it found the defendant to be death eligible or not. Unless it is clear that the jury

has found the defendant to be death eligible, I think that Apprendi requires that we find that the State has not met its burden of proof as to eligibility.

[I] think there are at least two types of cases where, even though the jury recommends a term of years or makes no sentencing recommendation, it is sufficiently clear that the jury has found the defendant to be death eligible that death may therefore be imposed consistent with Apprendi.

One such type of case is where the jury has made written findings as to death eligibility, i.e., step (2). . . . Because such findings would in my view eliminate the Apprendi problem, I would direct that they be required in cases proceeding under Ind. Code § 35-50-2-9.

A second such type of case is where the jury's verdict in the guilt phase of the trial, i.e., step (1), constitutes a finding of death eligibility. Pope v. State, 737 N.E.2d 374, 381 (Ind. 2000), reh'g denied, illustrates this type of case. . . .

. . . [T]he jury had demonstrated by its guilt phase verdict that it had found at least one of the eligibility factors to have been proven beyond a reasonable doubt: that the defendant had committed two murders at the same time. . . . As such, it was sufficiently clear that the jury had unanimously found beyond a reasonable doubt the existence of one of the eligibility factors set forth in Ind. Code § 35-50-2-9 (b). Id.

In conclusion, I would hold that Apprendi does not render Indiana's capital murder and sentencing regime, Ind. Code § 35-50-2-9, unconstitutional on its face. However, I would hold that Apprendi does not permit a sentence of death (or life without parole) to be imposed in Indiana where a jury has recommended a term of years or has made no sentencing recommendation unless there is a sufficiently clear showing that the jury has found unanimously that the State has proved beyond a reasonable doubt the existence of one of the eligibility factors set forth in Ind. Code § 35-50-2-9 (b).

. . . .

As to the other charged aggravating circumstance, killing while on probation, I am unable to join Justice Boehm's analysis. While he may be correct that Apprendi is satisfied with respect to this aggravator, I do not think that making a defendant eligible for death on the sole basis of a knowing killing while on probation "genuinely narrow[s] the class of persons eligible for the death penalty and … reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder," Stephens, 462 U.S. at 877, as required by the U.S. Constitution.

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JUVENILE LAW ISSUE

S. T. v. STATE, No. 20S03-0010-JV-606, ___ N.E.2d ___ (Ind. Mar. 20, 2002).
RUCKER, J.

S.T. was adjudicated a juvenile delinquent for the illegal consumption of alcoholic beverages, a Class C misdemeanor, and for committing acts that would have been criminal offenses if committed by an adult, namely: battery as a Class D felony and resisting law enforcement as a Class A misdemeanor. He appealed the adjudication contending he was denied the effective assistance of counsel. A divided panel of the Court of Appeals affirmed the juvenile court judgment. S.T. v. State, 733 N.E.2d 937 (Ind. Ct. App. 2000). Having previously granted transfer, we now reverse the judgment of the juvenile court.

. . . .

A fact-finding hearing was conducted September 10, 1999. Before evidence was presented, defense counsel declared that she intended to call three witnesses: S.T., S.T.'s mother, and L.C., a friend of S.T. The State objected and moved to prohibit the testimony of L.C. and S.T.'s mother on grounds that counsel had failed to submit a witness list ten days before trial as required by Elkhart County Local Trial Rule 13. The trial court agreed, granted the motion, and excluded the witnesses. After the conclusion of the hearing, the trial court adjudicated S.T. a delinquent. He appealed arguing ineffective assistance of counsel, and a divided panel of the Court of Appeals affirmed. . . .

. . . .

Elkhart County Local Trial Rule 13 provides in pertinent part:

> Ten days before the commencement of the trial of any criminal case or a civil case which is a 'first or second setting' . . . [e]ach party shall provide the court and each opposing counsel a final written list of names and addresses of that party's witnesses, as well as a written list of exhibits.
>
> If without just cause the exhibits and lists are not exchanged, stipulated to, or provided, then the exhibits or witnesses shall not be allowed to be used during the trial.

[Citation to Brief omitted.] . . .

There is no question that trial courts have the discretion to exclude belatedly disclosed witnesses. In that sense, the local trial rule in this case generally underscores the court's authority. However, that discretion is limited to instances where there is evidence of bad faith on the part of counsel or a showing of substantial prejudice to the State. [Citations omitted.] . . . Where a party fails to disclose a witness timely, courts generally remedy the situation by providing a continuance rather than disallowing the testimony. [Citation omitted.]

In this case there is no evidence that counsel acted in bad faith in failing to file a timely witness list. And neither before the trial court nor on appellate review does the State allege that it was prejudiced by counsel's conduct. Therefore, even though the local rule in this case may have suggested otherwise, S.T. should have been allowed to present the testimony of his two witnesses. The trial court's grant of the State's motion to exclude the witnesses was error. Accordingly, a timely defense objection to the motion would have been properly granted. We conclude therefore that counsel's conduct fell below an objective standard of reasonableness in failing to object to the State's motion. We conclude also that S.T. was prejudiced by counsel's conduct. [Citation omitted.]

The officers testified for the State and identified S.T. as the young man with whom they struggled and who fled the area. After the State rested, S.T. took the stand and testified that he had been home asleep at the time of the incident. According to S.T., he remained asleep until his mother woke him to take a telephone call from L.C. S.T.'s mother was prepared to testify that S.T. indeed was sleeping on the sofa when she awakened him to take a friend's call. And L.C., the friend who called S.T., was prepared to testify that he spoke with S.T. at the time he said he received the call. In his dissenting opinion, Judge Sullivan observed that although L.C. and S.T.'s mother were not exactly objective and detached witnesses, they nonetheless "would have added a different perspective to the defendant's version of events and reinforced his account, and therefore, the exclusion of the witnesses unnecessarily prejudiced the defendant." S.T., 733 N.E.2d at 944 (Sullivan, J., dissenting). We agree.

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SHEPARD, C. J., and BOEHM, DICKSON, and SULLIVAN, JJ., concurred.

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